

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW ERIC LOWE,

Defendant and Appellant.

D053449

(Super. Ct. No. SCD212398)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

A jury convicted Andrew Lowe of selling or furnishing cocaine base, a controlled narcotic substance (count 1) (Health & Saf. Code, § 11352, subd. (a))<sup>1</sup> but could not reach a unanimous verdict on the charge Lowe possessed cocaine base for sale (count 2) (§ 11351.5). Lowe appeals, contending the inconsistent verdicts show the evidence is

---

<sup>1</sup> All further statutory references are to the Health and Safety Code.

insufficient to support a conviction for sale of a controlled substance. We affirm the judgment.

## FACTS

On March 12, 2008, San Diego Police Department Narcotic Division Team Eight conducted an undercover operation near the 900 block of Park Boulevard, a popular area for drug sales. Detective Michael Day, an undercover officer, observed Lowe place a yellowish substance on top of a trash can and an unidentified man pick it up and leave. Based on his training and experience, Day assumed the substance was cocaine. Through a one-way transmitter, Day reported to Team Eight he believed Lowe was dealing drugs.

After a few minutes, Day approached Lowe and asked for a "40," slang for \$40 worth of cocaine. Lowe replied, "I don't know you" and walked across the street. Day watched Lowe approach and talk with a group of people standing behind some electrical boxes. Linda Hewlett, a codefendant, was in this group. Hewlett left the group and approached Day. She said Lowe asked the group if anyone knew Day. Hewlett then asked Day, "You are not the police, are you?" Day assured her he was not an officer. Hewlett said, "Okay. I'll tell them that I know you" and returned to the group.

Hewlett approached the group, and spoke only with Lowe. Day observed arm movements and a discussion between Lowe and Hewlett, but he could not hear their words or see their hands. Hewlett returned to Day and handed him .37 grams of rock cocaine worth \$40. Day handed Hewlett \$40. Hewlett returned to the group including

Lowe, and Day observed arm movements. Day never told Hewlett how much cocaine he wanted to purchase.

About one hour later, officers from Team Eight arrested Lowe and Hewlett. Officers found a razor blade with cocaine residue in Lowe's wallet, along with \$209 cash, but did not recover the marked bills Day used to purchase the cocaine. Day testified street-level dealers use a razor blade to cut rock cocaine off a "cookie," a larger piece of rock cocaine, and often use facilitators to execute their sales rather than sell directly.

## DISCUSSION

### I

When a defendant challenges a conviction for insufficient evidence, we apply the substantial evidence standard of review. A judgment will be upheld if it is supported by substantial evidence, even if evidence to the contrary also exists and a jury could have reached a different result. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) When facts are undisputed and different inferences may be drawn from evidence, an appellate court is not at liberty to make its own deductions. Rather, we accept the trier of fact's resolution of conflicting inferences. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 301; *People v. Alcalde* (1944) 24 Cal.2d 177, 184.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652 (*Roddenberry*); see also *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

The jury considered two theories of Lowe's guilt of selling cocaine base under section 11352: guilt as a principal and guilt as an aider and abettor. To prove guilt as a principal, the People had to show Lowe (1) sold, furnished, gave away or transported a controlled substance, (2) "knew of its presence[.]" (3) "knew of the substance's nature or character as a controlled substance[.]" and (4) "[t]he controlled substance was [cocaine base]." (CALCRIM No. 2300.) A person does not have to hold or touch something to sell it. It is enough if the person has control over it or the right to control it, either personally or through another person. (*People v. Taylor* (1959) 52 Cal.2d 91, 94 (*Taylor*).) To prove guilt as an aider and abettor the People had to show: "(a) the direct perpetrator's actus reus--a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea--knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus--conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

## II

Lowe contends the evidence is insufficient to support his conviction of selling cocaine as a principal, because he did not actually sell the cocaine to Day. Lowe also contends the evidence is insufficient to support his conviction of selling cocaine as an aider and abettor, because the jury found he did not possess any cocaine for sale as charged in count 2.

To convict Lowe as a principal, the jury needed to infer he had control over the cocaine because no direct evidence proved he controlled the cocaine sold to Day. (*Taylor, supra*, 52 Cal.2d at p. 94.) We conclude substantial evidence supports the jury's reasonable inference Lowe controlled the cocaine. (*Roddenberry, supra*, 44 Cal.App.4th at p. 652.) Only Lowe knew the amount of cocaine Day wanted to purchase. Lowe refused to interact with Day because Lowe did not know him. Hewlett approached Day and agreed to say she knew him. After speaking only with Lowe, she returned with the exact amount of cocaine Day had requested from Lowe. When Lowe was arrested, he had a razor blade with cocaine residue in his wallet, and dealers often use razors to cut cocaine into small pieces. From this evidence, a jury could reasonably infer Lowe was the principal who controlled the cocaine and Hewlett merely facilitated the sale.

Because the jury could reasonably infer control by Lowe of the cocaine sold to Day, the jury also could have found Lowe guilty as an aider and abettor, even though the jury may have concluded he did not possess the cocaine. (*Howard v. Owens Corning, supra*, 72 Cal.App.4th at p. 631.) Although Lowe contends that an inference he controlled the cocaine contradicts the jury's finding he did not possess the cocaine, control of the cocaine does not require possession. (CALCRIM No. 2300; see also *Taylor, supra*, 52 Cal.2d at p. 94.) Even were the verdicts inconsistent, inconsistent verdicts do not do violence to justice and are generally allowed to stand. (*People v. Avila* (2006) 38 Cal.4th 491, 600 ["if a defendant is given the benefit of an acquittal on the count on which he was acquitted, 'it is neither irrational nor illogical' to require him to

accept the burden of conviction on the count on which the jury convicted"].) Considering the record as a whole, we conclude the evidence was sufficient to support a verdict that Lowe sold, furnished or gave away cocaine base. (*Roddenberry, supra*, 44 Cal.App.4th at p. 652.)

#### DISPOSITION

The judgment is affirmed.

---

McDONALD, J.

WE CONCUR:

---

NARES, Acting P. J.

---

IRION, J.